ALL QUIET On the Waterfront

Esther Stern and John Mountbatten

To injunct or not to injunct: MUA v Patrick Stevedores.

Before the recent confrontation on the waterfront was 'settled' an article appeared in the June edition of this journal which focused on the industrial relations implications of the dispute.[1] The article which follows continues that narrative but looks, in particular, at a much neglected aspect of the controversy: namely, the pivotal role played by the courts (notably the High Court of Australia) in helping effect a settlement.

The appropriateness of judicial intervention in the waterfront dispute has been questioned by many commentators. One eminent barrister (formerly a Justice of the NSW Supreme Court), Andrew Rogers QC, put it this way:

> You can make orders of one kind or another, but it requires at least a modicum of good will ... and if there's one thing that's totally absent at the moment ... it's that element of good will. And this is really a political and economic problem and to try and get the law to solve it is an inappropriate course.[2]

To what extent is this true? Courts do not intervene in disputes of their own motion. In any legal system, parties seek to ventilate their claims and establish their rights. Courts respond accordingly.

Frequently, courts claim that they are solely interested in legal issues, that they are not in a position to make policy or be influenced by social conditions or economic circumstances. That mantra was intoned by the Full Federal Court during the course of these proceedings. Judicial restraint is often a virtue but extraordinary circumstances sometimes call for extraordinary measures. The waterfront dispute proved to be just such a case.

One of the more memorable images of the dispute was the spectacle of security guards wearing balaclavas, sunglasses and accompanied by guard dogs taking over the waterfront just before midnight on 7 April 1998. The clearing of the docks of the union work force and its replacement by non-union labour that night had its genesis in a complex series of inter-company transactions entered into between Patrick Stevedores and its 'in-house' labour hire companies the previous year. The sale by Patrick's labour hire companies of their stevedoring businesses for some $300 million, (the proceeds of which were mainly used to extinguish inter-company debts and to effect a share buy back in the order of $60-70 million) left those companies with only one asset: namely, the right to supply labour under agreements which could be terminated by Patrick's virtually without notice.[3]

Patrick's decision to terminate the agreements for the supply of labour was triggered by a clause which provided for unilateral termination in the event of any interruption to or interference with the supply of labour. This requirement was easily satisfied given the continuing agitation by MUA employees over the transfer of No. 5 Webb Dock to a non-union labour force employed by the National Farmers Federation backed Producers and Consumers Stevedores (PCS). There was, however, a problem: the decision to cancel the agreements was taken the day after the MUA applied to the Federal Court for an urgent order to

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prevent the labour hire companies from replacing MUA employees with non-union labour. Aware of the pending application before the Federal Court (which was listed for hearing on 8 April) Patrick, nevertheless, went ahead with the decision to terminate existing labour hire agreements, enter into fresh labour hire agreements for the supply of a non-union labour force, and appoint administrators to the four Patrick's companies — all on the one day! [4]

The termination of the labour supply agreements, accompanied by the appointment of administrators, appears to have been the final act of an intricate corporate strategy designed to replace Patrick's entire MUA workforce with non-union labour. As the MUA would subsequently argue in its statement of claim, this was an unlawful conspiracy in breach of the Government's newly enacted Freedom of Association provisions. Section 298K of the *Workplace Relations Act 1996* (Cth) prohibits employers from dismissing, injuring, or altering the position of employees to their detriment for prohibited reasons, including union membership or non-membership.[5] These provisions were designed, of course, to break up the closed shop but were used, ironically enough, by the MUA to support that very monopoly.[6] What Patrick did not factor in was the alacrity with which the courts would respond to the events of 7 April.

On 8 April, Justice North of the Federal Court granted the MUA an interim injunction restraining the administrators from formally dismissing the entire MUA workforce until the date of hearing (15 April). A last minute challenge to Justice North's jurisdiction on 16 April by both the NFF-backed stevedoring companies and the Government, on unspecified constitutional grounds, failed after the High Court disposed of the case the following day. An exasperated Justice Gaudron questioned whether the appellants were genuinely concerned with ventilating constitutional issues given that they failed to raise such issues with Justice North and that counsel representing the appellants had attended the hearing apparently without adequate instructions, prompting one memorable exchange:

> *Her Honour:* Has any jurisdictional point been taken by your clients?
>
> *Mr Murdoch* (for Chris Corrigan et al): I understand not, your Honour.
>
> *Her Honour:* Your clients accept the jurisdiction of the Federal Court ...?
>
> *Mr Murdoch:* Your Honour, I do not have instructions on that point.
>
> *Her Honour:* That is wonderful. I would have thought that at this stage of the proceedings the protagonists might at least know what position they take in relation to the jurisdiction of the Federal Court.
>
> *Mr Murdoch:* That is the position I am in, your Honour.
>
> *Her Honour:* Yes, well, I have a feeling I am being trifled with, but there you go.[7]

One of life's little ironies

On 21 April, having found, among other things, that there was an arguable case of an unlawful conspiracy (to breach s.298K) Justice North issued interlocutory orders in what has been hailed by labour lawyers 'as the most significant industrial law case since the end of World War II'.[8] In an innovative decision, his Honour ordered that while the services of the administrators (appointed by Patrick on 7 April) be retained, the pre-April 7 labour supply agreements be reinstated, with Patrick being obliged to satisfy all its labour requirements through its labour hire companies, pending a full trial. In ordering a return to the *status quo ante* his Honour, in effect, placed the rights of the workers ahead of the various financial and commercial considerations which the company urged the court to prefer. This caught the legal and corporate world by surprise. As Justice McHugh subsequently put it when considering Patrick's appeal against Justice North's decision in the High Court: 'It would be one of life's ironies if ... the tort of conspiracy which was used to hinder, if not seriously damage the trade union movement in the 19th century, is now, in combination with 298K [the freedom of association provisions], to be used against employers in the last decade of the 20th century'.[9]

Within days, and in a rare display of candour, the Full Federal Court handed down its decision unanimously upholding Justice North's orders (requiring Patrick to re-engage the unionised workforce it had stood down on 7 April) as 'free from appellable error'.[10] In a judgment broadcast live to air, Chief Justice Murray Wilcox made a number of observations concerning the role of the court. His Honour observed:

> As individuals, each member of the bench, like all sensible Australians, is in favour of an efficient waterfront ... But the Court, as a Court, has no view about such matters ... Just as it is not unknown in human affairs for a noble objective to be pursued by ignoble means, so it sometimes happens that desirable ends are pursued by unlawful means ... courts have to rule on the legality of the means whatever view individual judges may have about the desirability of the end. This is one aspect of the rule of law, a societal value that is at the heart of our system of government.[11]

Despite its avowed neutrality simply to uphold the rule of law, the practical effect of the Full Court's decision was to give priority to the economic interests of the employees. Not surprisingly, Patrick was unpersuaded by such rhetoric. Within the hour, its lawyers were in the chambers of another High Court judge, Justice Hayne, seeking a stay of Justice North's orders. That evening (24 April), Justice Hayne warned counsel to be ready for a full hearing on Monday, 28 April. The following day (Friday, 25 April) in granting the stay, his Honour insisted that counsel ensure the necessary paper work be faxed to the High Court by 5 p.m. that afternoon.[12]

Justice delayed is justice denied

The speed with which the courts dealt with this case has not gone entirely unnoticed. For example, it prompted a remark on the ABC's 'Law Report' that '[w]hile productivity on the docks may be at issue, no-one can question the productivity of the courts: from a single Federal Court Judge to the Full Bench of the High Court in less than a week, must be world's best practice'.[13] The Full Court of the High Court was particularly expeditious in its deliberations. It amalgamated the hearing of Patrick's special leave application with the appeal proper and within a week delivered judgment. On 4 May the High Court granted Patrick (and others) special leave to appeal but dismissed the appeal 6:1. In doing so, it varied Justice North's order in one important respect. It prefaced his Honour's order with the proviso that the administrators were to retain their right to make commercial decisions. This allowed the administrators to determine whether or not it was commercially viable to resume trading.

Most commentators had predicted a 4:3 majority in favour of the MUA.[14] So, why the unexpectedly high degree of judicial agreement? Could it be that the retiring Chief Justice played a significant role in shaping the majority judg-

ment? Chief Justice Brennan was already on the eve of retirement when these events erupted. How influential his Honour's unexpected return to the bench or his participation in behind the scenes deliberations might have been, can only be matters of speculation. Nevertheless, it is at least arguable that the decision of the majority permitting the administrators to retain their right to determine whether or not it was commercially feasible to continue to trade, brought about a degree of unanimity which was not expected. This development bears all the hallmarks of a sensible compromise position which was clearly endorsed, if not actually brokered, by the Chief Justice.

High Court Rules OK

Counsel for the MUA, Julian Burnside QC, put the matter rather colourfully when he suggested that it would be a sad day for justice if the High Court were 'powerless to do anything [to stop the conspiracy against the union members] except to watch Patricks count the dead and bayonet the wounded'.[15] Rhetorical flourishes aside, this was the gravamen of the union's complaint and, it seems, it did not fall entirely upon deaf ears. Arguably the timing of the ousting of the MUA workforce, while an application was pending before the Federal Court, was an important factor. As five justices put it: 'If the power of the Federal Court to prevent the frustration of its process was to be effective, extraordinary orders were needed'.[16] Whatever the ultimate ramifications of the proviso leaving the administrators with the discretion to make commercial decisions, the decision of the High Court was significant in paving the way for the return of the MUA workforce to the docks.

Various claims have been made about winners and losers in the aftermath of the recently negotiated settlement between the parties. Despite costs of some $20 million in legal fees and lost productivity, Patrick claims to have won. It points to having negotiated world's best practice at last, and estimates annual savings in excess of $50 million. The Federal Government claims it has achieved waterfront reform surpassing anything previous Labor administrations have delivered, even though non-union labour failed to maintain a presence on the waterfront. The MUA claims victory because, while conceding significant redundancies and the company's right to manage, it retained its monopoly on the waterfront and saved most of its members' jobs. Even the NFF backed supplier of non-union labour (PCS) which dismissed its workforce, claimed victory because of its pivotal role in gratuitously helping bring about waterfront reform.[17] The political posturing will continue. However, one thing is certain: the importance of the compromise effected by the High Court in confirming workers' legal entitlements, while at the same time acknowledging certain commercial realities, cannot be underestimated in providing a framework within which constructive negotiations could proceed.

In this dispute time was very much of the essence. The fundamental issue was whether the workers would be able to return to the workplace before, in a practical sense, it was too late. The fact that they did so within a reasonable time frame was in no small part due to the speed with which the courts dealt with the case at each stage of the appellate process: from the time that Justice North issued his preliminary orders on 8 April, until the High Court delivered judgment on 4 May. Particularly significant in this was Justice Gaudron's prompt disposal of the constitutional challenge to Justice North's jurisdiction. Indeed, at one stage, events moved so swiftly that the day that Justice Gaudron published her reasons for judgment was also the day that Justice North handed down his historic decision sending Patrick's shares into a tailspin from which they are likely to take some considerable time to recover.[18]

Whether to injunct or not to injunct was the question which lay at the heart of every stage of this case, from the time Justice North was called on to intervene, to the judgment of the Full Bench of the High Court. How that question should be answered in the context of competing claims depended, it was said, on applying the 'balance of convenience' test. The relevant questions, of course, are: whose convenience and on what basis is that balance to be struck? Answers to these questions, though traditionally couched in terms of the exercise of judicial discretion, inevitably depend on judges making value judgments. What else could explain the different decisions reached? Out of seven justices — to put it broadly — one (Gaudron J) endorsed the approach taken by the Federal Court; another (Callinan J, dissenting) supported the position advocated by the company and the Government; while, in a joint judgment, the remainder (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ) acknowledged that the claims of both sides had some merit and crafted orders accordingly.

Clearly, the discretion as exercised by Justice North and the Full Federal Court elevated the personal rights of workers in retaining employment free from discriminatory conduct over the financial interests and commercial considerations of the employer. On the other hand, while the majority of the High Court recognised the workers' claims to reinstatement and decided accordingly, by confirming the orders of the Federal Court, their Honours were not finally persuaded that these rights should prevail over the legitimate commercial interests of the company and the ability of the administrators to discharge their responsibilities in accordance with commercial imperatives.

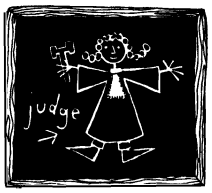
> It is one thing to restrain Patrick Operations from giving effect to the termination of labour supply contracts ... But it is a very different thing to fetter the discretion of the Administrators (and the creditors) in the exercise of the powers they possess under the *Corporations Law*.[19]

This was a balance of convenience more subtle and sophisticated than any commentator could have predicted. It preserved the dignity of labour while recognising the practical necessity of commercial life. True it is that the administrators were not required by the court to take the workers back — at least not in the face of clear commercial considerations to the contrary. On the other hand, by retaining the spirit and the substance of Justice North's orders, the High Court invited the administrators to do just that. While their Honours maintained that 'courts do not ... resolve disputes that involve issues wider than legal rights and obligations [but merely] define which rights take priority over others',[20] many will beg to differ. And in the case of this dispute it may perhaps be argued that the exception again proves the rule.

References

1. Lee, M., 'On the Waterfront', (1998) 23(3) *Alt.LJ* 107.
2. Channel 9, *The 'Sunday' Program* 26 April 1998 (transcript of interview); broadcast three days after the Full Federal Court had affirmed Justice North's orders of 21 April 1998. Also see Rogers, A., 'Was the Price Right?' *Sydney Morning Herald*, 25 April 1998, p.36.
3. Facts are taken from the judgment of the majority in *Patrick Stevedores v Maritime Union of Australia* [1998] HCA 30, 4 May 1998.

4. See especially, Justice Gaudron's judgment, ref. 3 above, point 95; see also: Glasbeek, H. and Mitchell, R., 'Breaking Custom on Labour Law', *Australian Financial Review* (*AFR*), 27 April 1998, p.18.
5. s.298L *Workplace Relations Act 1996* (Cth).
6. Professor Ron McCallum, ABC *Law Report* (transcripts), Radio National, 21 April 1998, p.3.
7. Gaudron J, *Patrick Stevedores v MUA*, 17 April 1998, Office of the Registry of the HCA (transcripts). See also: Davis, and others, 'Fight spirals across nation', *AFR*, 18-19 April 1998 p.4.
8. See comment by Professor Ron McCallum, above, p.1. See also Glasbeek and Mitchell above, who argue that 'the orders of the Federal Court threaten to throw the world of commerce into disarray'.
9. McHugh J, *Patrick Stevedores v MUA*, HCA Transcripts 27 April 1998, p.20.
10. *Patrick Stevedores v MUA* [1998] 397 FCA, 23 April 1998 per Wilcox CJ, von Doussa and Finkelstein JJ, p.5.
11. *Patrick Stevedores v MUA*, above, pp.4-5.
12. Hayne J (in Chambers), *Patrick Stevedores Operations v MUA*, Transcripts — 23-24 April.
13. Susanna Lobez, *ABC Law Report* (transcripts), Radio National, 28 August, together with Professor McCallum's comment: 'In my entire life, Susanna, I have never known a case proceed from first instance last Tuesday to a Full Bench of the Federal Court and to the High Court last Monday, where the Bench of seven rearranged their lives to sit. Normally, on a leave application, it's three judges with the appeal being heard by five', p.1. See also, Ackland, R., 'High Court keen to end wharf issue', *Sydney Morning Herald* 1 May 1998, Opinion 21: 'Clearly, the Chief Justice felt that the public importance of this special leave application by Patrick Stevedores demanded that the entire court be hauled into action ...'
14. See, for example, Tom Burton, *AFR*, 28 April 1998, p.7 who suggested 4:3 or 'quite possibly' 5:2.
15. Julian Burnside QC , *Patrick Stevedores v MUA*, High Court Transcripts, 28 April 1998, p.31.
16. *Patrick Stevedores v MUA* [1998] HCA 30, 4 May 1998, per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ, point 37.
17. See, for example, Tom Burton, 'Waterfront: everyone claims a slice of the cake', *AFR* 16 June 1998, p.4; also *AFR* 26 June 1998, pp. 24-27 and *The Weekend Australian* June 27-28, pp.22-23. For role of ACCC in continuing negotiations see Murphy, K., 'Contrinuing threat to waterfront peace', *AFR*, 15-16 August 1998; Grattan, M. and Murphy, K., 'Fels faces his biggest cartel', *AFR*, 15-16 August 1998, p.30.
18. Justice Gaudron made this order on 17 April 1998 and gave reasons for judgment on 21 April 1998 in *PCS Operations v MUA; MUA v Patrick Stevedores* [1998] HCA 29.
19. *Patrick Stevedores v MUA* [1998] HCA 30, point 54, 4 May 1998.
20. *Patrick Stevedores v MUA* [1998] HCA 30, point 83, 4 May 1998.



LEGAL STUDIES

The suggestions for class work and discussions below are based on the article *When Money Doesn't Matter* by Rebecca La Forgia on p. 164.

Questions

1. Why are the Mirrar people saying no to uranium mining at Jabiluka? Does the traditional owner have the right to say no to ERA's mine?
2. Outline the process an individual can take if they wish to complain under the Optional Protocol of the ICCPR. What other international instruments provide a complaint mechanism?
3. In the case of *Lansmann v Finland* the Human Rights Committee outlined the factors to be considered when determining whether or not a country has breached Article 27 of the ICCPR. What does Article 27 protect? What are the factors to decide if it has been breached? Are these factors made out by the present experience of the Mirrar people of the uranium mine at Jabiluka?
4. The Sami people were unsuccessful in their claim that Finland had breached Article 27 of the ICCPR. Why? Is the experience of the Sami any different to the experience of the Mirrar people? Could this lead to a different result?
5. Why does the author of *When Money Doesn't Matter* think that the international law on Article 27 of ICCPR has domestic application?

Discussion

1. Jabiluka and the proposed uranium mine on Mirrar land, on which construction has already begun, lie in a World Heritage protected area. Kakadu is a major Australian tourist attraction and an area of great beauty and environmental importance. Has Australian law operated effectively in dealing with this issue?
2. Uranium mining in Kakadu is a very complex issue. It is about environmental, economic, political, cultural and Indigenous interests — can the law ever effectively operate in such a context? Should it be expected to? If the law is not an effective tool in this kind of matter, what other kinds of action are legitimate?

Research

Research the impact, both positive and negative, of mining on Indigenous people in other countries. Consideration should be given to legal actions that have been brought by Indigenous groups against mining companies and governments in other countries. Look in particular at the situation in South America where Indigenous groups are legally challenging American oil companies and at the experience of groups in Papua New Guinea against BHP. Are these actions ever successful? If yes, why?

Debate

Uranium mining in Kakadu is a matter for the Australian Government. International agencies shouldn't get involved in domestic matters and they certainly shouldn't be able to make judgments about Australia's behaviour on any given issue.

Consider this with reference to other matters in which the domestic/international debate has surfaced, for example human rights in China, the Indonesian presence in East Timor and the issue of democracy in Burma. Also consider Australia's position on commenting on human rights and other issues related to trade and economics in other countries.

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